

ONE HUNDRED SEVENTH CONGRESS

Under the President's proposal, the new Secretary would have been authorized to exclude federal employees from merit system principles, whistleblower protection, and the right to form unions and bargain collectively. The bill adopted by the Committee restored these protections. In fact, the reported bill arguably provides employees with additional civil service protections not available under existing law. The following are the major changes:

- **Burton Substitute.** Section 730 of the Committee print, which was considered by the Committee as base text, deleted the provision granting the Secretary authority to exempt employees of the new Department from Title 5. In its place, Section 730(c) directs the Secretary to submit to Congress a proposal for a human resources management system demonstration project. In addition, Section 730(a) gives the Secretary authority to harmonize pay schedules and Section 730(b) extends to the Secretary the existing authority under Section 7532 of Title 5 to suspend or remove Department employees in the interest of national or homeland security.
- **Norton Amendment.** Rep. Norton offered an amendment, included as Section 730(f) in the Committee print, which provided that federal employees transferred to the new agency could not have their pay reduced. The amendment was adopted by voice vote.
- **Danny Davis Amendment.** Section 732(b) of the President's bill would have given the Secretary unlimited authority to enter into contracts with individuals for personal services, in effect allowing the Secretary to use at-will employment contracts to bypass Title 5. Rep. Danny Davis offered an amendment, included as Section 741 in the Committee print, to restrict this new authority to contracts needed to address "urgent homeland security needs." The amendment also limited the duration of these contracts to one year. The amendment was adopted by voice vote.
- **Tierney Amendment.** Section 804 of the President's bill allowed the Secretary to apply the employment system of any agency transferred into the new Department to new hires. Rep. Tierney offered an amendment to Section 804 to prevent the employment system of the Transportation Security Administration, which includes few of the protections of Title 5, from being applied to new hires outside of the Transportation Security Administration. The amendment was adopted by voice vote.
- **Morella Amendment.** Under existing law (5 U.S.C. §7103(b)), the President can strip an agency's employees of collective bargaining rights if he determines that the agency or subdivision's primary function is counterintelligence, investigative, or national security work. Rep. Morella offered an amendment, included as Section 731 of the Committee print, that provided that the President could not make such a determination with regard to agencies transferred to the Department unless their functions changed. The amendment was adopted by a vote of 21 to 19. Republican Reps. Morella, Gilman, and McHugh voted for the amendment.
- **Kucinich Amendment.** Rep. Kucinich offered an amendment, included in Section 731 of the Committee print, to strengthen whistleblower protections by giving employees across the government the right to sue for lost wages, as well as compensatory and punitive damages. The amendment was adopted by voice vote.

## **B. Procurement**

Under Section 732 of the President's bill, the new Department would be exempt from all procurement statutes, including those requiring competitive bidding. This exemption was largely eliminated during Committee consideration:

- **Burton Substitute.** Section 742 of the Committee print rejected the proposed exemption from procurement laws and instead authorized procurement flexibility for five years, based on the federal Emergency Procurement Flexibility Act introduced by Rep. Tom Davis and Chairman Burton. Under this authority, which may be used whenever the Secretary determines it is required to meet a homeland security need, the Secretary could raise the limit on government-issued credit cards from \$2,500 to \$15,000; raise the threshold for simplified acquisition procedures from \$100,000 to \$250,000; and allow goods and services up to \$10 million to be purchased using special acquisition procedures for commercial items.
- **Turner Amendment.** Rep. Turner offered an amendment to reduce the limit on government-issued credit cards from \$15,000 to \$5,000, the threshold for simplified acquisition procedures from \$250,000 to \$175,000, and the limit on special acquisition procedures from \$10 million to \$ 7.5 million. The amendment was adopted by voice vote.
- **Turner Amendment to "Other Transaction" Authority.** Section 732 of the President's proposal (Section 740 of the Committee Print) authorized the new Department to engage in "other transactions" for research and development (transactions "other" than Federal Acquisition Regulation (FAR) contracts, grants or cooperative agreements). Rep. Turner offered an amendment to add additional safeguards. Under the amendment, the authority is limited to five years, can be used only for research or development that involves responding to terrorism or an emerging terrorist threat, and requires a secretarial determination of need. In addition, the Turner amendment provides the Inspector General with audit rights and requires an annual report by GAO. The amendment was adopted by voice vote.

While these changes were positive, the Committee print also included in Section 744 new language on contractor indemnification. This provision, which was based on language proposed by Rep. Tom Davis, authorizes 19 cabinet departments and other agencies to indemnify contractors above the level of the contractor's private insurance coverage for losses caused by acts of terrorism. The provision also authorizes the departments to indemnify contractors who enter into contracts with state and local governments. Rep. Waxman offered an amendment to delete any indemnification for state and local contracts and to allow the Secretary to limit indemnification for federal contracts if the Secretary determines that indemnification would unduly burden American taxpayers. The amendment was withdrawn.

### **C. Property**

Under Section 732 of the President's proposal, the new Department was exempted from federal property laws and given broad authority to acquire and dispose of both real and personal property. In particular, this authority would have affected the 24,000 real property facilities owned by the Coast Guard. Under the President's proposal, the new Department could sell any of this Coast Guard property without restriction and retain the proceeds for any purposes.

Rep. Waxman offered an amendment, included as Subtitle G of Title VII of the Committee print, based on bipartisan property reform legislation, H.R. 3947, that the Committee reported in March 2002. Under this amendment, the Department receives some new flexibility in managing its property, but safeguards are included to ensure that the new Department responds to local community input, considers local zoning laws, and receives fair market value. The amendment also ensures that the property is screened for potential benefits to the homeless and the public. The amendment was adopted on a voice vote.<sup>1</sup>

### **D. FOIA/FACA**

Section 731 of the President's proposal exempted advisory committees of the new Department from the Federal Advisory Committee Act (FACA), which requires open and announced meetings and opportunities for all viewpoints to be represented. In addition, Section 731 of the President's proposal also exempted individuals who serve on those committees from several conflicts of interest provisions. The Burton substitute deleted these provisions.

The major "good government" exemption in H.R. 5005 that was not eliminated or significantly curtailed during committee consideration was the exemption in Section 204 to FOIA. In fact, this exemption was expanded:

- **Burton Substitute.** Section 204 of the President's bill provided that any information about "infrastructure vulnerabilities or other vulnerabilities to terrorism" submitted voluntarily that "is or has been in the possession of the Department" would be exempt from FOIA. The Burton substitute narrowed this exemption slightly by striking the "is or has been in the possession of the Department" language. Under the Burton substitute, disclosure of voluntarily provided information would be prohibited under FOIA only if "such information was provided to [an] agency only by the Department."

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<sup>1</sup>Prior to the adoption of the Waxman amendment, Rep. LaTourette offered an amendment to delete the provisions of the President's proposal that gave the new Department property flexibility. This amendment was defeated 13 to 18. On the Republican side, Reps. LaTourette, Ose, and Jo Ann Davis voted for the amendment. On the Democratic side, Reps. Waxman and Turner voted against the amendment.

- **Schakowsky Amendment.** Rep. Schakowsky offered an amendment to strike Section 204, the FOIA exemption. The amendment was defeated 11 to 22 on a party-line vote, except that Rep. Turner voted against the amendment.
- **Tom Davis Amendment.** After the amendment by Rep. Schakowsky to strike Section 204 was defeated, Rep. Tom Davis proposed an amendment to expand the FOIA exemption to cover voluntarily submitted information at twelve other agencies. Rep. Waxman offered a second-degree amendment that excluded “any information submitted in the course of lobbying” from the new FOIA exemption. As amended, the amendment passed by voice vote.

**E. Chief Financial Officer (CFO)/Chief Information Officer (CIO)/Inspector General (IG)**

The President’s bill created a CFO, but did not apply the provisions of the CFO Act. As a result, the CFO would not be Senate-confirmed and none of the financial management requirements of that law, such as annual independent audits, would apply to the new Department. Section 904 of the Committee Print applies the CFO Act.

Similarly, the President’s bill created a CIO, but did not apply the Clinger-Cohen Act, so none of the information management requirements of that law, such as assuring the security of information systems, would apply. Section 905 of the Committee print applies the Clinger-Cohen Act.

Section 710 of the President’s bill created an IG modeled on the one at the Department of Treasury and the Department of Justice, providing the new Secretary authority to stop investigations by the IG. Unlike those IGs, however, the President’s bill did not give the IG authority to report to Congress in cases where the Secretary limits the IG’s authority. Section 710 of the Committee print reverses this policy, directing the IG to notify Congress when the new Secretary tells the IG not to carry out an investigation. In addition, the Committee adopted by voice vote an amendment by Rep. Schakowsky, which was included as Section 710, to give the IG oversight authority for internal affairs investigations at the Customs Service and Secret Service.

**F. Federal Information Security Management**

The Committee print includes a new Title X containing the Federal Information Security Management Act drafted by Rep. Tom Davis. This language requires the new Department to develop government-wide standards for information security for day-to-day agency operations, such as web sites, financial management systems, and e-mail services. This new authority is intended to cover only actions that protect against “unauthorized” access to information.

## **G. Additional Amendments**

In addition, the Committee adopted the following amendments relating to the management of the new Department:

- **Fewer Assistant Secretaries.** The Committee adopted by voice vote an amendment by Rep. Burton to reduce the number of assistant secretaries from 16 to 12.
- **New Deputy Secretaries.** The President's bill established an Under Secretary for Management. The Committee adopted by voice vote an amendment by Rep. Horn and Rep. Schakowsky to elevate this position to a Deputy Secretary and to create a Deputy Secretary for Policy.
- **Privacy Officer.** The Committee adopted by voice vote an amendment by Rep. Waxman to Section 103 to create an officer within the new Department who would assume primary responsibility for privacy policy, including assuring that the new Department complies with the Privacy Act and reports to Congress on privacy complaints.
- **Office of Civil Rights.** The Committee adopted by voice vote an amendment by Rep. Schakowsky, included in the Committee print as Section 604, to create an Office of Civil Rights within the new Department.
- **Office of Small and Disadvantaged Business.** The Committee adopted by voice vote an amendment by Rep. Danny Davis, included in the Committee print as Section 745, to establish an Office of Small and Disadvantaged Business Utilization to ensure participation of such businesses in the new Department's procurement contracts.
- **Reorganization Plan.** The Committee adopted by voice vote an amendment offered by Rep. Burton to Section 802 that requires the new Secretary to submit to Congress a plan for reorganizing the functions of the transferred agencies. The reorganization plan would become effective 90 days after the plan is sent to Congress or at the end of the transition period, whichever is the earlier date.
- **Changes to Eligibility for Federal Assistance.** The Committee accepted an amendment by voice vote, offered by Rep. Maloney, which would enable states and localities to receive Federal assistance for community needs that they could not get relief for in the past, such as schools, nonprofit hospitals, and utilities.

## **II. Limited Changes to Substantive Structural Aspects**

With respect to the substantive structural aspects of the President's proposal, the Committee left many areas alone. There were several very close votes, however, on extracting

agencies with significant functions unrelated to homeland security, such as FEMA, the Coast Guard, and the Secret Service.

**A. Visa Processing and Immigration**

The Burton substitute transferred all visa processing functions from the State Department to the new Department of Homeland Security. The Committee adopted by voice vote language offered by Rep. Lantos and Rep. Ros-Lehtinen that replaced the Burton substitute. The Lantos/Ros-Lehtinen language would vest in the new Secretary exclusive authority (through the Secretary of State) to issue regulations for consular officers who approve and deny immigrant visa applications.

The Committee also considered an amendment by Rep. Weldon, included in Section 403, requiring the new Department to review all visa applications from citizens of Saudi Arabia, effectively ending the “visa express” program there. The amendment was adopted 17 to 16 on a party-line vote.

In addition, the Committee adopted by voice vote an amendment by Rep. Schakowsky (included as Section 406) to require a report on aggregate immigrant visas, as well as another amendment to create an ombudsman (included as Section 407) to address legitimate immigrant grievances.

**B. APHIS**

The President's bill proposed moving all of the Animal Plant Health Inspection Service, including roughly 7,000 employees, into the Homeland Security Department. This proposal was significantly modified by the Committee. Section 404 of the Burton substitute would only move those aspects of APHIS related to “agricultural import and entry inspection activities,” excluding quarantine activities.

**C. Other Adopted Amendments**

Other substantive amendments adopted by the Committee included the following:

- **State and Local Coordination.** Rep. Horn and Rep. Schakowsky offered an amendment, included as Section 702, to establish an advisory committee made up of federal, state, and local officials to focus particularly on ensuring state and local participation and coordination. Rep. Shays offered an amendment to Title VII, included as Subtitle F to Title VII, to enhance information and intelligence sharing with state and local entities. Rep. Tierney offered an amendment to Section 501 to maintain the programmatic integrity of existing state and local partnerships under the COPS program and the FIRE Act and to provide enhanced assistance to state and local emergency responders. Each of these three amendments was adopted by voice vote separately.

- **Requirement for National Strategy and Threat Assessment.** Rep. Shays and Rep. Kucinich offered an amendment, included as Section 733, to require a national strategy for homeland security and a comprehensive assessment of the threats facing the country. The amendment was adopted by voice vote.
- **Assistant Secretary for Narcotics Interdiction.** Rep. Souder and Rep. Cummings offered an amendment to Section 103 to create within the new Department an Assistant Secretary for Narcotics Interdiction to coordinate interdiction functions among the Coast Guard, the Customs Service, the Border Patrol, and the Defense Department. The amendment was adopted by voice vote.
- **Minimum Standards for Private Security Officers.** Rep. Kucinich and Rep. Barr offered an amendment, included as Section 506, to establish minimum standards for private security officers and to encourage states to meet them by increasing nonemergency FEMA grants up to 10%. The amendment was adopted by voice vote.
- **Plan to Provide Potassium Iodide.** Rep. Tierney offered an amendment to Section 503 to require the new Secretary to develop a plan for the distribution of potassium iodide as expeditiously as possible in the event of a terrorist attack, a major disaster, or other emergency related to nuclear power plants. The amendment was adopted by voice vote.
- **Seaport Security Report.** Rep. Putnam offered an amendment, included as Section 408, to clarify that the Coast Guard would continue to report to Congress regarding the security of seaports. The amendment was adopted by voice vote.

#### **D. Rejected Amendments**

The Committee generally rejected amendments to remove significant components from the new Department. The amendments related to the structure of the new Department that were considered and rejected included the following:

- **Structure of INS.** Rep. Mink offered an amendment that would have transferred INS to the Department of Homeland Security while recognizing INS's dual functions of enforcement and services. Additionally, it would have given the authority to establish and administer rules governing visas to the new Department. It failed on a voice vote.
- **Strike Coast Guard.** Rep. Tierney and Rep. Mica offered an amendment that would have removed the Coast Guard from the Department of Homeland Security. It failed 16-19. Republican Rep. Mica voted in favor of this amendment.
- **Strike Secret Service.** Rep. Ose offered an amendment that would have removed the Secret Service from the Department of Homeland Security. It failed 16-17. Republican



Reps. Ose and Horn voted in favor of this amendment. Rep. Norton voted against this amendment.

- **Strike FEMA.** Rep. Mink offered an amendment that would have removed FEMA from the Department of Homeland Security. It failed on a voice vote.

Other amendments that were considered and rejected included the following:

- **Corporate Expatriation Transactions.** Rep. Turner offered an amendment that would have prohibited the awarding of Department contracts to corporations that have entered into corporate expatriation transactions. The amendment failed 13-20. Republican Rep. Horn voted in favor of the amendment.
- **TSA Security Screener Eligibility.** Rep. Owens offered an amendment would have made individuals who are eligible for the Armed Forces eligible to become security screeners. The amendment failed 17-20. Republican Reps. Morella and Tom Davis voted in favor of this amendment.